# BILLS FOR ACCOUNT.

*Preliminary.*—In the field of equity jurisprudence there probably is no single topic presenting such difficulties as technical Bills for Accounting. These difficulties arise not so much from the inherent nature of the subject as from what Professor Langdell, in his luminous discussion of such bills,[1] terms the ignorance of equity lawyers and judges, who, while the common law action of account existed, had little concern with such bills, and who, when the common law remedy became obsolete, and equity assumed the jurisdiction, have never learned the principles on which the jurisdiction rests.

No cases found in the books are more elusive of analysis, for the purpose of fixing their precise value as precedents, than those involving bills for account. The courts are often uncertain of the real ground upon which the jurisdiction in any particular case should be assumed or denied; and it is common to find the judicial mind groping for more than one ground upon which to rest the decision, with no especial emphasis on any one. Principles are still further obscured by numerous and confusing *dicta*. These observations are especially applicable to bills by principal against agent, and bills for the settlement of so-called mutual accounts.

Secondary writers have usually taken their cue from the courts, and have ventured very cautiously and timidly into these judicially troubled waters. Their treatment of the topic is characterized by broad general statements, with little effort at discrimination or concreteness; and in the voluminous list of cases cited, the investigator finds comparatively few that are enlightening.[2]

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[1] BRIEF SURVEY OF EQ. JURISP. 74-124—under designation of "True Bills of Account."

[2] The scholarly discussion of Prof. Langdell, already referred to, and that of Judge Story, 1 EQ. JURISP. §§ 442-459, are striking exceptions. The reader may also consult, on the general subject: 3 POMEROY, EQ. JURISP. 1421—two sections only devoted to this topic: and for a generous, if not discriminative, collection of the cases, 1 Cyc. 351; 1 Enc. Pl. and Pr. 83; 1 C. J. 588.

It is, therefore, with some misgiving that the present modest attempt is made to clear up for the busy practitioner some of the perplexities likely to confront him in the effort to maintain or to resist a bill for an accounting.

*Exclusive Jurisdiction—Concurrent Jurisdiction.*—At the outset, we must distinguish between bills for account of legal (as distinguished from equitable) demands, of which equity has exclusive jurisdiction—or at least inherent jurisdiction independent of any other equity—Professor Langdell's "True Bills of Account"—and demands purely equitable, or those over which the jurisdiction of the law and equity courts is concurrent, or, again, where the equitable jurisdiction is exercised as ancillary to some other equity. This distinction is vital to a clear apprehension of determining principles.

As presently to be indicated, accounting is sought more frequently than otherwise as merely ancillary to the enforcement of some other equitable demand, or by reason of the inadequacy of the legal remedy, because of the less efficient machinery of the law courts to do justice between the parties.

Such cases, of course, do not involve the question of independent jurisdiction; and one must carefully guard against being led astray by the many *obiter* expressions which are encountered in the opinions in such cases, touching the independent jurisdiction.

We cannot hope, in our brief discussion, to remove all of the difficulties which are inherent in the subject, or which courts and text-writers have imported into it, but, with Professor Langdell's masterly exposition as a guide, we may hope to segregate and emphasize some of the pertinent principles by which courts of equity are supposed to be guided in determining the question of jurisdiction of suits of this nature.

Probably every account taken in an equity suit is embraced in one or other of the following categories:

I. *Account of purely equitable demands.*

II. *Account of legal demands as ancillary to other equitable relief.*

III. *Account because of inadequacy of the legal remedy—under the concurrent jurisdiction.*

IV. *Account as an independent equity—True bill of account.*
V. *Mutual accounts.*

Taking these up in order:

I. ACCOUNT OF PURELY EQUITABLE DEMANDS.

*Equitable Demands.*—That a court of equity should take jurisdiction of demands purely equitable, and compel the defendant to do justice in the premises, seems scarcely to need explanation or justification, since it is for the purpose of enforcing equitable rights that courts of equity exist.

If, therefore, to secure to the plaintiff his equitable rights, whether these require the payment of money or the doing of other things by the defendant, an account needs to be taken, such account will be ordered, regardless of the relations of the parties or the nature of the account.

Here the plaintiff is in equity not primarily for an accounting as an independent equity—nor because, by reason of complexity or need of discovery, the remedy at law is inadequate, nor because of defendant's legal duty to account—but on the broader ground that, because of the *equitable nature of the demand,* there is a complete absence of remedy elsewhere. Such cases make no difficulty.

*The Same—Illustration.*—The most familiar illustration of this class of accounts is, of course, that between the trustee and *cestui,* and generally between those occupying a strictly fiduciary relation.

So, in any other case where plaintiff asserts demands cognizable only in equity, as in connection with constructive trusts, rescission of contracts and of conveyances for fraud or mistake, foreclosure or redemption of mortgages, subrogation of sureties, controversies among lienors as to their respective priorities, derivative suits by minority shareholders on behalf of the corporation [2a]—none of which demands is remediable at law since they are all purely equitable in their nature—and an account seems necessary, it is ordered as a matter of course. But

[2a] As shareholders here sue on behalf of the corporation whose claim is legal, possibly the jurisdiction rests rather in the absence of a remedy at law.

here the need of accounting is not essential *in point of jurisdiction.*

II. Account of Legal Demands as Ancillary to Other Equitable Relief.

*Account as Ancillary.*—A further familiar principle of equity is that when the court properly assumes jurisdiction of a cause for one purpose, it will proceed to do complete justice between the parties, even to the administering of relief otherwise purely legal. Here, again, little difficulty is encountered in vindicating the equity jurisdiction, independent of the accounting.

*Injunction—Complete Relief.*—Thus, where the plaintiff is properly in equity seeking an injunction against continued trespasses or other wrongs—such as the wrongful cutting of timber or working of mines, or infringement of patent-rights, copyrights or trade marks—equity is not content with granting the injunction only, but will proceed to administer complete relief by requiring an account of the damages or profits.[3] Here the jurisdiction rests on the *necessity for the injunction* and not on the *right to an accounting.*

*Discovery.*—Again, where the plaintiff comes into equity to obtain discovery essential to his proofs, and discovery is obtained, equity may retain the bill and proceed to give complete relief although the claim asserted be purely legal. And if an accounting is necessary to such complete relief, an account will be ordered. Here, again, jurisdiction having attached for purposes of discovery, it attaches for all purposes, including an accounting.[4]

[3] Miller *v.* Willis, 95 Va. 337; Coons *v.* Coons, 95 Va. 434; Higginbotham *v.* Hawkins, L. R. 7, Ch. App. 676; Root *v.* Railway Co., 105 U. S. 189; Porter *v.* Spencer, 2 Johns. Ch. 169; Hawley *v.* Cramer, 4 Wend. 717, 728; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

[4] Corporation of Carlisle *v.* Wilson, 13 Ves. 279; Sturtevant *v.* Goode, 5 Leigh, 83; Lyons *v.* Miller, 6 Gratt. 427, 438; Simmons *v.* Simmons, 33 Gratt. 451; Wilson *v.* Miller, 104 Va. 446; Woodfolk *v.* Graves, 113 Va. 182; Fowle *v.* Lawrason, 5 Pet. 495 (per Marshall, C. J.); 1 Story Eq. Jurisp. 456. As the jurisdiction here rests in the need of discovery, jurisdiction will of course be ousted if no discovery be had, or if the answer deny the essential allegations of the bill, or if answer under oath be waived: McFarland *v.* Hunter, 8 Leigh, 489, 501; Smith

## III. Account because of Inadequacy of Legal Remedy—Concurrent Jurisdiction.

*Inadequacy of Legal Remedy.*—A third and equally familiar principle is, that where the remedy at law is for any reason not plain and complete, equity will supply a remedy and make it complete.

Hence, where the controversy between plaintiff and defendant, for whatever reason, cannot be satisfactorily adjusted in a jury trial at law, the equity jurisdiction attaches.[5]

*Complexity.*—Probably the commonest cases in which the equity jurisdiction is invoked on the allegation of inadequacy of the legal remedy, are those in which the accounts between the plaintiff and the defendant are so complex as to render a trial by jury impracticable. If the controversy involve the settlement of accounts of too complex a nature in fact for adjustment by a jury at law, it is in accordance with established practice for equity, on a proper case made, to assume jurisdiction of the controversy, whether legal or equitable, and to require an accounting if this be necessary to complete relief.[6]

It is to be observed that in these cases the jurisdiction does not rest on the relations of the parties, nor on the legal duty to account, nor on the equitable subject-matter, but is based solely on the ground that because of the complicated nature of the accounts, their settlement in a jury trial would be impracticable—in short, the inadequacy of the legal remedy. The equity jurisdiction over mutual accounts seems mainly thus to rest in the complexity of such accounts, or in the need of discovery. The treatment of such accounts, however, is deferred to a later section.

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*v.* Smith, 92 Va. 696; 7 Va. Law Reg. 107-117; Roanoke Street Railway Co. *v.* Hicks, 96 Va. 510; Johnson *v.* Mundy, 123 Va. 730; Blood *v.* Blood, 110 Mass. 545; whereas, waiver of the verified answer is immaterial to the jurisdiction where the jurisdiction is not dependent on discovery: U. S. *v.* Asheville Nat. B'k, 73 Fed. 379; Cochrane *v.* Adams, 50 Mich. 16, 14 N. W. 681.

[5] Cases collected in 1 Cyc. 420 *et seq.*

[6] Taff Vale Railway Co. *v.* Nixon, 1 H. L. Cas. 111; O'Connor *v.* Spaight, 1 Sch. & Lef. 309; Lafever *v.* Billmyer, 5 W. Va. 33; Fowle *v.* Lawrason, 5 Pet. 494; Wilson *v.* Miller, 104 Va. 446; Davis *v.* Marshall, 114 Va. 193; Oglesby Co. *v.* Ould Co., 117 Va. 546.

How much complexity must appear in order to warrant the exercise of the jurisdiction in a particular case, is a question for the sound discretion of the court, and each case must depend on its own peculiar circumstances.[7]

It is clear, on the authorities, that the mere circumstance that there are numerous items of debit and credit does not of itself create such complexity as to confer equity jurisdiction. If so, every merchant's ledger account against his customer might thus be tried.[8]

*Complexity, Continued—How Charged.*—Where the plaintiff thus seeks the assistance of a court of equity to compel defendant to render an account on the ground of complexity, it is not sufficient to allege in general terms that the account between

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[7] For illustrative cases, see note 6 *supra;* Governor *v.* McEwen, 5 Humph. (Tenn.) 241—a case which might have been sustained under our 4th class, *infra;* Kirby *v.* Lake Shore, etc., R. R., 120 U. S. 130; Gaines *v.* New Orleans, 17 Fed. 16; Pacific R. Co. *v.* Atlantic R. Co., 20 Fed. 277; Colonial, etc., Co. *v.* Hutchinson, 44 Fed. 219—an instructive opinion—jurisdiction maintained under our 4th head, *infra;* Lyman *v.* Long Dock Co., 20 N. J. Eq. 396; Blood *v.* Blood, 110 Mass. 545; Ward *v.* Peck, 114 Mass. 121; Pierce *v.* Eq. Ass. Soc., 145 Mass. 56; Bank of Scotland *v.* Christie, 8 Cl. & F. 214; Jackson *v.* King, 82 Ala. 432, 3 So. 232—a case of peculiar interest. The action was *assumpsit* at law, and the plea *non-assumpsit.* The appellate court held that the claims and counterclaims presented were too complex to be settled by a jury, and that the lower court (apparently *ex mero motu*) should, for that reason, have instructed the jury to find a verdict for the defendant, and the higher court itself directed a dismissal of the action. The case is unique as an illustration of a court of law (not exercising a jurisdiction under the code system of pleading), admitting its inability to enforce a confessedly legal claim, and recognizing the superior remedy afforded by its ancient rival, the court of equity. Cf. Reeside's Ex. *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. Prof. Langdell (*ubi supra*, 106) expresses the more persuasive view that the jurisdictional objection cannot be raised in the common law court; but that plaintiff or defendant must invoke the aid of the equity court. The reason why it cannot be made in the law court is that the complexity will naturally not appear from the plaintiff's declaration, but only on the defendant's filing his cross-demands. The declaration, therefore, setting out a proper case for trial in the law court, that court, under established rule, must try it. A court of law cannot decline to try a case of which it has jurisdiction. LANGDELL, *ubi sup.*, 106-109.

[8] Bassett *v.* Cunningham, 7 Leigh 302; Langdell, 108-109.

the parties originated in many transactions, and, as a legal conclusion, is of too complex a nature to be settled by a jury; but the bill must state specific facts from which, on a demurrer by the defendant, the court may determine, from the face of the bill, whether or not such complexity does in fact exist.[9] The burden here of establishing the necessary complexity rests on the party invoking the equity jurisdiction.

*Multiplicity of Parties.*—Another common instance of the equitable jurisdiction under this head is presented where the parties plaintiff are so numerous as to render the legal remedy inconvenient. In such cases, equity will assume jurisdiction and will permit one or more of the parties to maintain a bill on behalf of themselves and their associates for the assertion of a demand otherwise proper for a court of law—including, of course, an accounting where necessary for complete relief.[10] Here the burden of establishing the necessary multiplicity is on the plaintiff.

In the treatment of bills for account, under the three classifications already noticed, the main purpose has been to eliminate these bills from the field of discussion, in order to clear the way for a more careful study of the fourth class, namely, accounting as a primary and independent equity, or, in Professor Langdell's apt phrase, 'True Bills of Account.' No effort has been made, therefore, to exhaust the instances in which the first three classes of bills will lie, or to elaborate the principles controlling them.

## IV. Account as an Independent Equity—True Bills of Account.

*Preliminary.*—It is in connection with this class of bills that Professor Langdell, as quoted at the beginning of this article deplores the circumstance that when the common law action of account became an inheritance of the equity courts, the equity judges and equity lawyers did not inherit along with the juris-

[9] Davis *v.* Marshall, 114 Va. 193; Beggs *v.* Edison El. Ill. Co., 96 Ala. 295, 38 Am. St. Rep. 94; Lafever *v.* Billmeyer, 5 W. Va. 33.

[10] Berkshire *v.* Evans, 4 Leigh 223; Coffman *v.* Sangston, 21 Gratt. 263; Perkins *v.* Siegfried, 97 Va. 444.

diction a clear-cut notion of common law principles governing this action. The consequence has been, as already indicated, a distressing confusion of professional and judicial thought, resulting in a notable lack of harmony in the decisions of the courts.

*The Question under Inquiry.*—Excluding, then, the three classes of bills already discussed, the present inquiry is, *When is there original and independent jurisdiction of bills for accounting in equity?* That is, When has equity jurisdiction of bills for an account where the controversy is *legal* and *not equitable;* where there is *no other equitable relief sought,* to give color to the jurisdiction; where there is *no complexity, no multiplicity of parties,* and *no need of discovery?*

*The Origin of the Equity Jurisdiction of Account.*—The authorities seem at least agreed that the equity courts have succeeded to the jurisdiction exercised by the common law courts in the now obsolete *action of account*—and that wherever the latter action lay at common law, its modern substitute, the *bill for account,* will lie.[11] And not only so, but, in the absence of special circumstances to be noted later, the remedy in equity is practically *exclusive.* When we have considered the nature of the cases in which the jurisdiction is exercised, we shall perhaps be better able to see why the common law courts provided the special remedy of account, why it was exclusive of any other common law action, and why equity found little difficulty in gradually drawing the exclusive jurisdiction to itself.

In order, therefore, to determine the question of equitable jurisdiction by virtue of this inheritance, it is necessary to hark back to the now obsolete common law action of account. The learning that clusters about this archaic action is somewhat refined and technical, and too voluminous for present purposes; and we can hope here to do little more than to present some of the more important principles pertinent to the topic.

[11] Beggs *v.* Edison El. Ill. Co., 96 Ala. 295; Huff *v.* Thrash, 75 Va. 546; Fowle *v.* Lawrason, 5 Pet. 495; Colonial, etc., Co. *v.* Hutchinson. 44 Fed. 219; 1 STORY EQ. JURISP. 442-445; authorities collected in 1 Cyc. 416-419. Especial reference is made to Prof. Langdell's scholarly essay, in his BRIEF SURVEY OF EQUITY JURISDICTION, 75 *et seq.*, which has been freely drawn upon in the preparation of the present article.

*The Duty to Account—No Liability until Account Taken.*—As we shall see a little later, the right of the plaintiff, under the present head, to demand an accounting of the defendant, and the right of the defendant to exemption from liability to pay until an accounting has been had and a balance struck, are not founded on contract, but on the *legal duty* on defendant's part to account, as well as the *legal right* of the defendant to present, in the form of an account, all the credits to which he is entitled. The common law raises this duty and this right, and equity affords the remedy. A contractual duty to account will sustain an action for damages, but not a bill for account.[12]

*Contrast With Other Equitable Accounting.*—There are several striking contrasts between other bills for account and the true bill for an account. For instance, in the former the burden is ordinarily on the plaintiff to establish the amount due, whereas in the latter the burden is uniformly on the defendant to present the account, and to sustain its correctness by proper evidence. Again, the main purpose of the former, ordinarily, is to recover money due from the defendant to the plaintiff in the nature of *a debt* due—that is, the money sought to be recovered is the *defendant's money,* until actual payment—and the accounting is merely an ancillary proceeding by which to ascertain the amount due [13]—whereas, in the latter, the accounting and the striking of the true balance are the *principal objects sought,* and the decree for payment follows, incidentally, to prevent a multiplicity of suits. Furthermore, in the latter, the money to be paid in settlement of the balance found due is, and has always been, rightly the *money of the plaintiff* and never rightly the defendant's.

These principles should become clearer when their application is illustrated by concrete examples to follow.

*Classes of Agencies Subject to Account.*—Seeing that the jurisdiction of the bill for an account here rests exclusively on

[12] LANGDELL, 74-75. The right of the defendant to discharge himself, in whole or in part, by his sworn answer, is to him as valuable a right as that of filing the bill for the accounting is to the plaintiff.

[13] This, of course, is not always true in the case of the *cestui* against the trustee.

the duty and right to account, as an implication of law, and not as the result of contract, it becomes necessary to inquire in what cases this duty is implied. The instances are comparatively few, and include three classes of persons only, namely *guardians, receivers* and *bailiffs.*[14] As the term guardian here needs no special comment, it will suffice briefly to notice the other two classes, namely, *receivers* and *bailiffs. Executors* were not held to account in the common law courts, but were exclusively under the jurisdiction of the ecclesiastical courts. Their accountability is now largely a matter of statute, as is that of the guardian.

1. *Receivers.*—A receiver, in the sense here used, is one who receives money of another, with the owner's consent or ratification, for the sole purpose of keeping it safely for such time as may be fixed by contract or course of business, and at the proper time paying it over to the owner—less agreed charges only—but who is not under the duty of restoring the identical bills or coin in which it was received, and yet without the right to make himself a mere debtor of his principal by mingling the fund with his own and crediting the owner with the amount.[15]

The receiver has no right to use the money as his own, by debiting himself and crediting his principal with the amount, for then he would be a mere *debtor—e. g.,* a bank receiving a deposit. The money must remain rightfully the money of the principal.

If there be a duty of investing, or otherwise paying out, the money on behalf of the owner, the defendant is not a receiver but a *bailiff.*

If he receives the money merely for immediate transmission to the principal, and not for safe-keeping, he is a mere *servant, collector, agent* or *carrier.*

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[14] 1 STORY, EQ. JURISP. 445; LANGDELL, 75; BACON, ABR. *Accompt,* A; 2 Roll. Abr. 161. Actions of account between merchant and merchant were scarcely exceptions, since the defendant in such cases was charged as bailiff or receiver.

[15] LANGDELL, 76; BACON, ABR. *Accompt,* B; 1 CO. LITT. 172a; 1 STORY, EQ. JURISP. 445.

If he is bound to restore the identical bills or coin he is a mere *bailee.*[16]

2. *Bailiffs.*—A bailiff is one who by consent or subsequent ratification of the owner, receives money, or the possession or control of the property of another, for the purpose of using it or its proceeds (as by investing, converting, managing, selling, leasing, hiring, laying out, exchanging or otherwise dealing with it) *for the profit of the owner.* He is entitled to an allowance for his reasonable charges and expenses; but, like the receiver, is under no duty to restore the identical coin or bills in which received, but without right to become a debtor for the proceeds or profits by debiting himself and crediting his principal with the amount thereof.[17] Here again the money or property must remain the property of the principal.

*The Bailiff—Illustrated.*—The typical illustration of a bailiff, though the term is of a wider significance, is the agent, or steward, or superintendent, or manager—or by whatsoever designation known—who has charge of landed estates, with power and duty of making contracts with tenants, collecting rents, pur-

[16] LANGDELL, 76-80; Fowle *v.* Kirkland, 18 Pick. 299—action of account by partner against co-partner, after dissolution, for an account of partnership funds received by defendant since the dissolution—defendant held accountable as receiver; *Cf.* Kelly *v.* Kelly, 3 Barb. (N. Y.) 419, 422. *Vid.* authorities collected in 1 Cyc. 404. The term "receiver", as here used, contemplates appointment by the act or ratification of the owner *in pais*, and is carefully to be distinguished from a court receiver, whose duties and responsibilities rest upon different principles. In America little or no use is made of the term receiver, except in reference to a court receiver, and instances of a receivership *in pais* are comparatively rare.

[17] LANGDELL, *ubi sup.;* CO. LITT. 17a; BAC. ABR. *Accompt*, B; 1 STORY, EQ. JURISP. 446. Cf. Reeside's Ex'r. *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. It is not sufficient that the bailiff or receiver have the mere custody of the money or property as servant of the owner. The distinction between possession and custody is well illustrated, as pointed out by Prof. Langdell, in the domain of the criminal law, in the distinction between embezzlement and larceny. A true receiver or bailiff may be guilty of embezzlement of the *res* of which he is receiver or bailiff, but not of larceny (LANGDELL, 79 n.); and possession by the bailiff is not possession by his principal. The office of bailiff, therefore, contemplates the exercise of large discretionary powers, and, in large measure, operations not under the immediate eye of the principal.

chasing machinery, selling farm products, making repairs, paying taxes and other charges, and at stated intervals rendering an account of his stewardship, and paying over the net balance to his principal. Such broad agencies are more common in England than with us in America, though real estate agents, with some, if not all, of these powers, are quite common in our own country. But economic and commercial activities in America present many illustrations of analogous agencies under various names, upon whom there rests the duty to account,[18] and hence of bailiffs, though not so termed. Concrete examples will be noticed later.

*The Same—Equitable Jurisdiction.*—The statement that bailiffs and receivers are subject to account, means not only that they are thus subject to account (at common law, in the action of account, and later in equity), but that *in point of jurisdiction,* every such agent is thus accountable. That is to say, the jurisdiction rests not in the equitable title of the plaintiff, since *ex hypothese* he has the legal title; not in complexity of accounts, for no such complexity need exist; not in necessity of discovery, since the plaintiff may be full-handed with his proofs.[18a] In short, where the duty to account thus exists by implication of law—and it exists only in the instances mentioned—this duty of itself is sufficient to confer the jurisdiction.[19] The reasons will appear later.

While the jurisdiction exists in every such case, it is probable that where the plaintiff's claim concerns a single item, or but few items, with no items of discharge set up, and he is thus full-handed with his proofs, and there is no complexity or other special ground for equitable intervention—in short, where the remedy at law is plain, adequate and complete—equity, though possessing the jurisdiction, would decline to exercise it, on the same principle on which it declines jurisdiction in cases of fraud, of which it has concurrent jurisdiction, where the remedy at law is adequate.[19a]

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[18] See cases *infra;* Mitchell *v.* Gt. Works, etc., Co., Fed. Cas. 9662.

[18a] See following paragraph.

[19] 1 STORY, EQ. JURISP. 463-464.

[19a] 1 STORY, EQ. JURISP. 464. See Green *v.* Spalding, 76 Va. 411.

*Bailiffs Accountable—Why Not Other Agents?*—It is of interest to inquire why the action of account (or the modern bill in equity) lies against the bailiff or receiver, and *indebitatus assumpsit* or other appropriate action against other agents—and, in the former case, even in the absence of complexity or need of discovery. The answer lies in the difference in the relations of the parties in the two cases, in the nature of the agencies themselves, and especially in the legal duty and right to account flowing from the relation.

The office of bailiff, for example, contemplates not only custody and control of the principal's property, with wide discretionary powers, but dealings with third persons not under the immediate instructions or supervision of the principal; the receipt of funds of the principal from the sale or other disposition or use of the latter's property; disbursements on the principal's account out of the principal's funds; and an unliquidated balance in the hands of the bailiff, *not in the nature of a debt,* but consisting of funds already belonging to the principal, and hence substantially, though not technically, trust funds. The relation, therefore, is one of highly fiduciary character, though not amounting to a technical trust relation, because *the legal title remains in the real beneficiary,* the principal. The bailiff, therefore, occupies an intermediate position between the ordinary agent and the trustee of an active trust. While these considerations of themselves are sufficient in point of jurisdiction to sustain the bill for an account, in actual practice most suits of this nature will present other features, in themselves sufficient to justify the equity jurisdiction—as the need of discovery, or the presence of too great complexity for adjustment in a jury trial. Indeed the practical necessity of discovery in bills for accounting, and complexity in the account, usually present, are frequently suggested by courts and textwriters as the real foundation of the equity jurisdiction of true bills of account. But the point to be emphasized here is that *neither of these is essential to the jurisdiction.*

*The Same, Continued.*—Such being the nature of the bailiff's office, it is not difficult to understand why the common law raised the duty of accounting, and the correlative right on his

part to insist that before he might be molested as a debtor, he should have opportunity to present an account showing not only the items of *charge* but of *discharge* as well.

And since, as shown, the money or property for which he was accountable was the property of his principal—for which the bailiff could not be held a debtor until the true state of the account and the balance due were ascertained—and since the ordinary machinery of the law court was not suitable for the taking of such an account, the reason why the principal could hold the bailiff or receiver to an accounting of his stewardship *only by the action of account* seems clear.[20]

It necessarily followed, therefore, that not only might *indebitatus assumpsit* not be maintained against the bailiff or receiver anterior to the accounting and striking of a balance, but that the action of account was the sole remedy in such case—as its substitute, the bill in equity, still is. It is therefore not the *nature of the account*—whether complex or otherwise—that confers the present equitable jurisdiction, but the peculiar character of *the relation,* the peculiar nature of the plaintiff's claim, and (since the passing away of the action of the account) the *complete absence of any legal remedy.*

*Distinction between Bailiff and Trustee.*—This description of the bailiff indicates how closely his office approaches that of the trustee of an express active trust. The latter, as does the bailiff, holds and controls the money or the property of another, to be used for the benefit of the owner, and without the right of mingling the funds so held with his own funds and thus making himself a debtor for the money or the proceeds of the property, by charging himself and crediting the same on his books. What, then, is the distinction between the two? Why, at the original common law, must the principal have sued the bailiff in an action of account *at law,* while the *cestui que trust* must have sued the trustee (as he still must) in *equity?* A search of the books yields little or no light on the subject. The answer, however, seems clear. In the case of the bailiff legal litle remains (nor-

[20] Reeside's Ex'r *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. To maintain *indebitatus assumpsit,* the defendant must be shown to have been a *debtor* at the commencement of the action.

mally) in the principal, howsoever broad the powers of the bailiff, whereas, in the case of the trust (normally) *legal title is in the trustee,* with equitable title only in the principal or *cestui.* The *cestui's* remedy, therefore, was necessarily in equity, while the remedy of the principal against the bailiff was, for precisely the opposite reason, at law.

*Bailiff and Trustee—Contrast Continued.*—This close kinship between the bailiff and the trustee doubtless made easy the merger of the action of account at law into the bill for an account in equity.[21] The circumstance that in actions of account there were presented normally, though not necessarily, both complexity and the need of discovery, as already mentioned, afforded an additional incentive to the equity courts to assume the general jurisdiction of these cases.[22]

*The True Foundation of the Jurisdiction—Résumé.*—While, then, the jurisdiction of the true bill of account in equity courts may have been quickened by the features, normally present, of complexity, need of discovery, and kinship to trusts, in its last analysis the real foundation of the jurisdiction is the *legal duty* of the agent to account, the corresponding right of the principal to require specific performance of that duty, and defendant's right to an accounting as a condition precedent to being held as a debtor in an action of *indebitatus assumpsit,* or in any other form of action.[23]

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[21] The trust relation between the principal and his bailiff is made the chief, though not the sole, basis of jurisdiction in Virginia cases of Zetelle *v.* Myers, 19 Gratt. 62; Thornton *v.* Thornton, 31 Gratt. 212; Simmons *v.* Simmons, 33 Gratt. 451, and Wilson *v.* Miller, 104 Va. 446, but in none of them is the agent termed bailiff—though in each the defendant was a typical example of the bailiff.

[22] In Reeside's Ex'r *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503, it is held that in such cases no other than the action of account will lie at law against the bailiff, since there is *no cause of action until the account is settled* and the balance due is ascertained. The court says: "The question is not, as it is sometimes supposed, whether a jury can as conveniently settle the account as auditors, but it adheres to the right of the defendant to render his account before he can be molested by an action to refund. The law will not imply a promise to repay before his liability to refund has been ascertained." *Cf.* Jackson *v.* King, 82 Ala. 432, 3 So. 232.

[23] The bailiff or receiver may, of course, make himself a debtor—for example, by wrongfully converting the fund to his own use and

*Illustrations, Continued*—(1) *Managers of Estates—Managing Agencies Generally.*—As shown in preceding sections, the term bailiff includes persons, by whatsoever title known, who have the management and control of landed estates, and whose duties require them to control, manage, receive and pay out the intake thereof on behalf of the owner.[24]

The term would necessarily include also managers or agents of commercial, manufacturing, financial, or transportation, and similar enterprises, of charitable, social and other institutions, individual or corporate, whenever the powers and duties of the agency are those of a bailiff as described.

(2) *Sales Agents—Factors—Commission Merchants.* — A bill will lie by the owner against an agent for the sale of property (real or personal) for an account and payment over of the net proceeds, as well as against factors and commission merchants and auctioneers to whom the plaintiff has consigned personal property for sale—since each of these agencies constitutes the relation between the owner and the agent one of principal and bailiff.[25]

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refusing to account therefor—and thus subject himself to liability in *indebitatus assumpsit* at the plaintiff's option. But he may not thus by his own wrong deprive the plaintiff of his right to an accounting in equity.

[24] Such were the defendants in the cases of Zetelle *v.* Myers, 19 Gratt. 62; Thornton *v.* Thornton, 31 Gratt. 212; and Simmons *v.* Simmons, 33 Gratt. 451—in all of which cases bills for accounting were sustained, but rather on other grounds of equitable jurisdiction, and without a distinct recognition of defendants as bailiffs. See cases in preceding footnote. Makepeace *v.* Rogers, 11 Jurist. (N. S.) 215.

[25] McKenzie *v.* Johnston, 4 Madd. 373 (consignment of goods for sale); Townes *v.* Birchett, 12 Leigh 173—auctioneer held to an account of a stock of goods sold for principal—jurisdiction upheld on the ground that the items of the account were "in the knowledge of the auctioneer exclusively"—hence the need of discovery. The court here lost the opportunity of recognizing the relation of principal and bailiff, and of vindicating the independent jurisdiction, even in absence of need of discovery or of complexity in the account. In Vilwig *v.* B. & O. R. Co., 79 Va. 449—a suit by a railroad company to require an account from its station agent (a typical bailiff)—the court came very near reaching the true principle, though throwing in, for good measure, as the same court, with practical uniformity, has done in similar cases, enough of 'need of discovery', 'complexity', 'mutuality of account' and 'trusteeship' and 'fiduciary relations', to obscure the real basis of the

*The Same, Continued—Bailiff Making Himself a Debtor.*—But, as pointed out by Professor Langdell,[26] the agents mentioned in this section who make it their *regular business* thus to sell for others, by common usage and for convenience in bookkeeping, generally make themselves *debtors* to their customers by treating the proceeds of the customers' property, not as the property of the customer, but as their own, by mingling the proceeds with their own bank-deposits. But for this custom, such agencies would be driven to open a separate deposit account for every customer.

Where the agent has thus become the debtor, *indebitatus assumpsit* will lie, but the principal has the option of regarding the money so deposited as still his own, and of filing a bill for an account.[27]

(3) *Principal and Agent—Solicitor and Client—Banker and Customer.*—In spite of numerous *dicta* to be found in judicial opinions to the contrary, it is clear in principle, and on authority, that the ordinary relation of principal and agent, or of solicitor and client, in the absence of powers and duties coincident with those of the bailiff or receiver as heretofore indicated, does not warrant equitable jurisdiction of a bill for accounting by the principal or client against the agent or solicitor.[28]

So, the ordinary relation between a bank and its customer is one of debtor and creditor. The moment a general deposit is made, the deposit becomes completely the property of the bank; and for the reason that the money thus becomes the property of the bank, the latter cannot be a receiver or bailiff.[29]

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jurisdiction assumed. In McLin *v.* McNamara, 2 Dev. & Bat. 82, an auctioneer (bailiff again) was held subject to account, but on the untenable ground that the existence of partial payments rendered the account *mutual.* The American cases cited in this and the preceding footnote, not to mention others, seem to justify Langdell's criticism noted at the beginning of this article.

[26] *Ubi supra,* 92-93.

[27] *Vid.* Com. *v.* Stearnes, 2 Met. (Mass.) 343—auctioneer failing to pay over proceeds of goods sold, held not guilty of embezzlement "since the money was his own". See Com. *v.* Foster, 107 Mass. 221.

[28] Hemmings *v.* Pugh, 9 Jurist (N. S.), 1124. See Padwick *v.* Hurst, 18 Beav. 375.

[29] Foley *v.* Hill, 2 H. L. Cas. 28. Nor is such an account necessarily

*Principal and Agent, Continued.*—While, as stated, the mere relation of principal and agent will not sustain a bill by the principal for an accounting, yet if the plaintiff is able to bring his case within any of our first three classes above—that is, where the claim is equitable merely; or the account is ancillary to other equitable relief; or where, because of complexity or the necessity of discovery, the remedy at law is inadequate—or, again, where the agent is a receiver or a bailiff, under definitions of those terms in preceding sections—or where the accounts are mutual, as defined in subsequent sections—then it is clear enough that the equity jurisdiction for an accounting will attach.[30]

(4) *Royalties to Authors — Patentees — Lessees, etc.* — Whether account lies in these cases depends on the precise nature of the contract. Where, under the contract, the publisher, or lessee, becomes the *owner* of the proceeds or product, and a *debtor* to the author, licensor, or lessor, for the latter's royalties or other agreed compensation, under the principle already explained a true bill of account does not lie—since the relation of the parties is that of debtor and creditor. But when, under the terms of the contract, the plaintiff is entitled to a *specific share* of the net proceeds, the rule is the reverse—since here the relation becomes *fiduciary* and the defendant a bailiff.[31]

*The Same*—(5) *Partners.*—Equity has long been regarded as the proper tribunal for the settlement of the accounts of a copartnership. The jurisdiction rests on several grounds—the

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or ordinarily mutual. Deposits made are but loans to the bank, and checks paid are but partial payments. See Langdell's ingenious suggestion that payment of the customer's check gives rise to a cross demand, and is not the payment of a debt. LANGDELL, 115. See *Mutual Accounts, infra.*

[30] Padwick *v.* Hurst, 18 Beav. 375 (client against solicitor); Barry *v.* Stevens, 31 Beav. 258, 31 L. J. Ch. 785; Marvin *v.* Brocks, 94 N. Y. 71; Coffman *v.* Sangston, 21 Gratt. 263; Thornton *v.* Thornton, 31 Gratt. 212; Simmons *v.* Simmons, 33 Gratt. 451, 456; Wilson *v.* Miller, 104 Va. 446; Herrell *v.* Supervisors, 113 Va. 594; Davis *v.* Marshall, 114 Va. 193 (bill by agent against principal dismissed for want of special equity); cases collected in 1 Cyc. 416, *et seq.* Compare *dictum* in Zetelle *v.* Myers, 19 Gratt. 62, 70. Circumstances under which the agent may maintain a bill for accounting against the principal, are discussed in a later section.

[31] LANGDELL, 93-94; Pratt *v.* Tuttle, 136 Mass. 233.

complexity of the accounts; the fiduciary relation; the lack of complete legal title in any partner to any part of the partnership assets; the necessity of accounting to ascertain the true state of the account between the several partners; and, finally, as ancillary to a dissolution and partition of the net assets—the last in itself justifying equitable intervention.

Professor Langdell asserts that the last is the true ground, since courts of equity usually decline to settle such accounts in the absence of a prayer for dissolution and partition—save where, after dissolution, the account is taken as ancillary to a division of the assets.[32] If this be true, as it seems to be, it follows that a bill for settlement of partnership accounts is not a true bill for account; since, in absence of special equities, such bills can be maintained only as ancillary to the relief of dissolution and a division of assets—or of the latter only where the firm is already dissolved.[33]

(6) *Co-Tenants.*—Where one co-tenant has received the rents or profits of the common property *by consent* of the other, he may be held to an accounting in equity, on the ground that he is a receiver or bailiff. If he has received the profits without his co-tenant's consent, and has appropriated them to his own use, a bill for accounting will lie as ancillary to *partition* proceedings, but not otherwise—in the absence, of course, of other grounds of equity jurisdiction as heretofore discussed. In the first case, he is a bailiff, but not in the second. This unsatisfactory rule of the common law was altered in England by statute of 4 Anne, (Ch. 16 A. D. 1706). It was substantially adopted in Virginia[34] by the revision of 1792, and carried into the Code of

[32] LANGDELL, 96-97.

[33] See LINDLEY ON PARTNERSHIP (4th ed.) 1022 n; 30 Cyc. 461 *et seq.* Compare Tillar *v.* Cook, 77 Va. 477; Jones *v.* Murphy, 93 Va. 214; Clarke's Admr. *v.* Clarke, 125 Va. 68; Fowle *v.* Kirkland, 18 Pick. 299—action of account by partner against copartner for funds collected after dissolution; defendant held accountable as *receiver.*

[34] "An action of account may be maintained against the personal representative of any guardian, bailiff or receiver, and also by one joint tenant, or tenant in common, or by his personal representative, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." Va. Code 1887, § 3294.

1887, but for some unaccountable reason was omitted from the revisal of 1919, with the unhappy consequence of restoring the inconvenient and unjust rule of the common law.[35] The omission is noted in the table of sections as "omitted", but, without explanation. The effect was probably overlooked by the revisors.

*Bailiff's Right to Maintian the Bill.*—As a general rule, the proper plaintiff in bills for accounting is naturally the principal and not the agent, since the duty of accounting normally rests upon the latter. Even where the principal is proceeding against the agent at law, in *indebitatus assumpsit,* the agent may not, on principle, invoke the interposition of equity on the allegation that he is a bailiff and not accountable in *indebitatus assumpsit,* and that the remedy at law is inadequate. The defence of liability to account as bailiff only, is a plea in bar of the action *in the law court,* and should be made in that court.[36]

The chief instance in which the agent, subject to account, may sustain a bill for accounting against the principal (in the absence of special circumstances of complexity, etc.) is where the former claims to be in surplusage to the latter—that is, that he has not only paid out all monies of the principal in his hands, but has expended additional funds of his own. If in such case the agent could not maintain the bill, he would be without remedy, since naturally the principal is not likely to move for an accounting.[37]

So, also, where the agent is entitled to a *specific share* or interest in the proceeds of the subject matter of the agency, and these are under control of the principal, so that the obligation

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[35] See Early *v.* Friend, 16 Gratt. 21—construing the statute; Newman *v.* Newman, 27 Gratt. 714; Adkins *v.* Adkins, 117 Va. 445; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550, and note—an excellent opinion by Field, J.; 1 MINOR, REAL PROPERTY, 891, 922. See Kirkman *v.* Voulier, 7 Ala. 218—sustaining bill for account by part owner of ships against his co-partner; 6 POMEROY, EQ. JURISP. 1420-1421; 1 Cyc. 404; monographic note, 38 L. R. A. 829-864.

[36] LANGDELL, 105. See *infra, Indebitatus Assumpsit against bailiff.* See Davis *v.* Marshall, 114 Va. 193.

[37] See LANGDELL, 90—noting the singular dearth of direct authority.

to account rests on the latter—as in the case of a salesman entitled to a specific share of the proceeds or profits, and not merely to a sum measured by a percentage thereon. The situation here is analogous to that of author and publisher already noticed.[38] Here, the employer is, with respect to the salesman's commissions or percentage of profits, the bailiff, and the salesman the principal.

*Indebitatus Assumpsit against Bailiff—Equity Jurisdiction Exclusive.*—As the *res* in the hands of the bailiff is the property of the principal, and the obligation to account does not create the relation of debtor and creditor until account taken and balance struck, it follows, as a general proposition, that *indebitatus assumpsit* cannot be maintained against the obligor to account in advance of the actual accounting.

If therefore the bailiff is sued at law, before account taken, he may set up the relation of bailiff to the plaintiff, and the unsettled state of the account, in bar of the action. Nor is evidence of money or property received as bailiff admissible to establish an *indebitatus assumpsit* prior to the settlement of the account—certainly where it appears that there are items both of charge and discharge.[39]

It follows that, by the common law, no action lies against a bailiff for an accounting of monies in his hands except the action of account—and that, since equity assumed the jurisdiction, the equity jurisdiction is exclusive.[40]

*Defences to the Bill.*—Defences peculiar to a true bill of accounting are: (1) *That defendant is not under obligation to account*—because not occupying the necessary relation of bailiff or receiver to the plaintiff. This issue, decided in favor of the defendant, and in the absence of other circumstances justifying the jurisdicton, will result in the dismissal of the bill. This de-

[38] Pratt. *v.* Tuttle, 136 Mass. 233; Harrington *v.* Churchwood, 6 Jurist (N. S.) 576; Albaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676.

[39] LANGDELL, 86-88, 105; See Thomas *v.* Thomas, 5 Exch. 28, and Langdell's comments, 88. Compare Beggs *v.* Edison El. Ill. Co., 196 Ala. 295.

[40] Subject to the exception, already noticed, of conversion of the money or property by the defendant.

fence, of course, challenges the jurisdiction. (2) *That defendant has already accounted to the plaintiff*—or that the account has otherwise been adjusted by agreement of parties (*plene computavit*). This plea established will likewise call for a dismissal of the bill. Nor need the plea here allege *payment* of the balance found to be due, since the jurisdiction is based on the *obligation to render the account,* and not on the obligation to *pay the balance* found due. The latter once ascertained, the remedy for its recovery is at law, except where the account is taken in the equity suit—in which case plaintiff is entitled to a decree for the payment of the balance, to prevent a multiplicity of suits. This plea, in the first instance, is a challenge not to the jurisdiction, but to the merits of the cause. (3) That the *res* in the bailiff's hands *has been lost or destroyed by inevitable accident,* or by the wrong of third persons, without fault of the defendant. That such a loss or destruction is a complete discharge (or *pro tanto,* if the loss be partial only) follows from the postulate that the *res* in question belongs to the plaintiff, and the agent is not a debtor therefor. Such a plea likewise goes not to the jurisdiction but to the merits.

[*To be continued.*]

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